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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 511

ELIZABETH J. DUVAL (revived in the name of Zelda Stewart by Order of the Supreme Court of Florida dated April 8, 1959),

Petitioner,

Versus

VERNON T. THOMAS and RUBY LEE THOMAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

O. K. REAVES and
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THE FREE PRESS TAMPA FLORIDA

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IN THE

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No. _____

ELIZABETH J. DUVAL (revived in the name of Zelda Stewart by Order of Supreme Court of Florida dated April 8, 1959),

Petitioner,

vs.

VERNON T. THOMAS and RUBY LEE THOMAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Zelda Stewart, in whose name the cause was revived upon suggestion of the death of Elizabeth J. Duval, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above cause on the 17th day of July, 1959; rehearing denied September 24th, 1959.

(a) OPINIONS BELOW

The Opinion of the Supreme Court has not been officially reported. Copy is attached hereto as Appendix A. 114 So. 2d 791

The Opinion of the District Court of Appeal of Florida, Second District, from which the cause was taken to the Supreme Court by certiorari, is officially reported in 107 So. 2d 148. Copy is attached hereto as Appendix B.

(b) CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The grounds on which the jurisdiction of this Court is invoked are that the effect of said judgment of the Supreme Court of Florida is—

(1) To take the property of this petitioner without due process of law and to deny her the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States; and

(2) The State Court, by ignoring the said provision of the U. S. Constitution, and so adjudging the case as to deny petitioner the exclusive possession and use of her own property and give respondents and others equal use thereof, has decided the case probably not in accord with applicable decisions of this Court.

(i) The date of the judgment or decree sought to be reviewed and the time of its entry is July 17th, 1959 (R. 42).

(ii) Petition for rehearing was filed in the Supreme Court of Florida on July 29, 1959 (R. 50), and denied on the 24th day of September, 1959 (R. 54).

(iii) The statutory provision believed to confer jurisdiction on this Court to review the said judgment by writ of certiorari is Title 28, U.S.C.A. §1257 (3).

(c) QUESTION PRESENTED FOR REVIEW.

The question presented for review is whether petitioner, the owner, *by government survey, of a portion of the bed of a non-navigable land-locked lake, defined by section line running through the lake on the east, and like lines running into the lake on the north and south,* had the right to build and may maintain a roadway or ramp extending 28 feet from the shore and about eight feet wide in that portion of the bed and waters of the lake which she owns in fee simple, or whether she must remove the ramp so that others may use the waters in the space the ramp occupies.

(d) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes which the case involves are:

That part of the Fourteenth Amendment to the Constitution of the United States which says:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Constitution, Declaration of Rights, Section 1 (Florida Statutes, 1957, Vol. 3, page 3057) which says:

> "All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety."

Florida Constitution, Declaration of Rights, Section 12 (Florida Statutes, 1957, Vol. 3, page 3058), which says:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. . . ."

Florida Statutes, 1957, §2.01 (Vol. 1, page 2), which says:

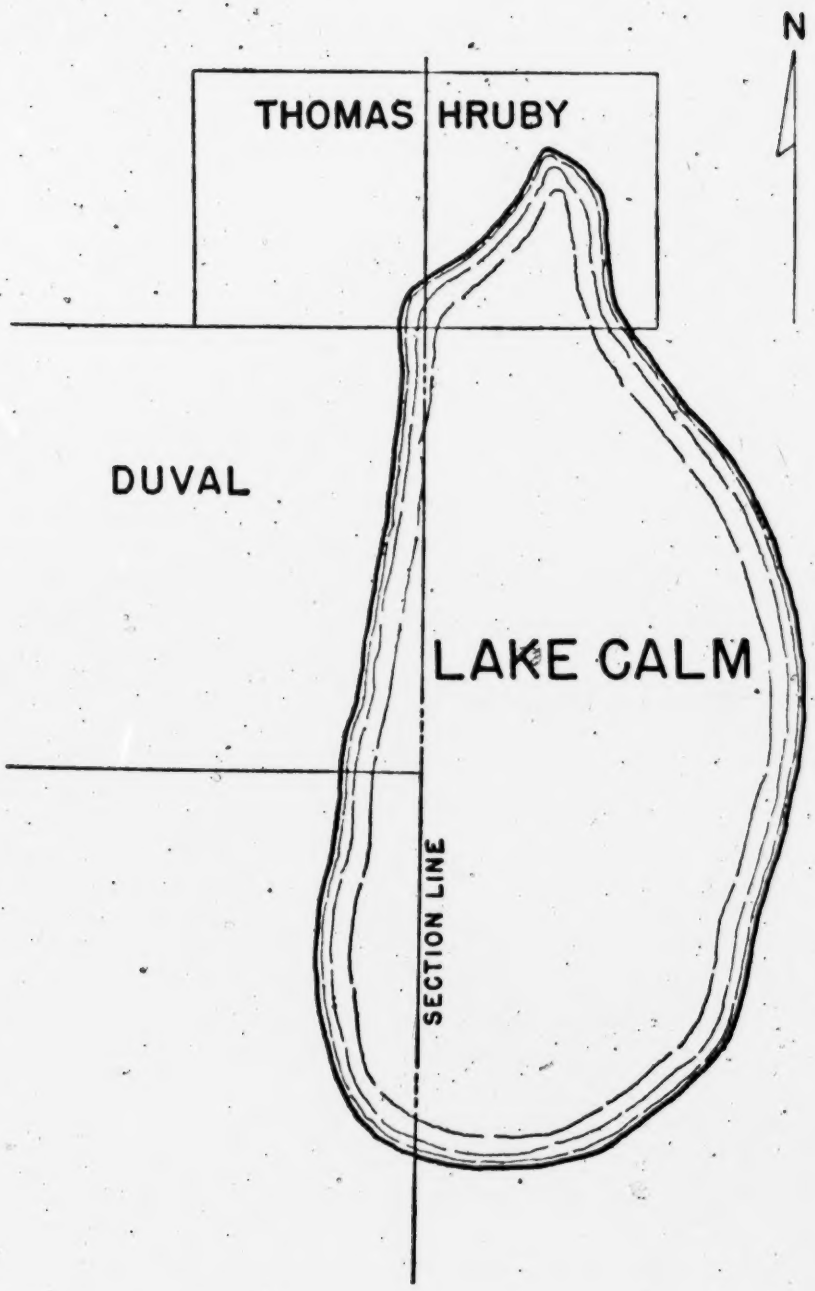
> "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

(e) CONCISE STATEMENT OF THE CASE.

A concise statement of the case, containing the material facts involved, is that plaintiffs in the trial court (respondents herein), Vernon T. Thomas and wife, sued Duval (petitioner's predecessor in title) and Hruby, in the Circuit Court of Hillsborough County, Florida, averring that Duval owns the SE ¼ of the SE ¼, Sec. 10, Twp. 27, Range 17 East; that plaintiffs own a described

10 acres immediately north of and adjacent to the Duval tract; that defendant Hruby owns property adjoining plaintiffs to the east; that Lake Calm lies immediately east of plaintiffs' lands and of the Duval lands, and that the NE corner of the Duval lands is the SE corner of plaintiffs' lands, and that *said corner is in Lake Calm* a short distance from the shore. It is further alleged that Hruby had built a fence on part of her west line which is the Thomas east line, and set posts to extend it down to the common corner of Thomas, Hruby and Duval; that Duval had a bull dozer push land along the southern boundary of Thomas' land out in the lake to said common corner, and that the combined acts of Hruby and Duval prevent Thomas from getting into the lake to boat, bathe and fish. They prayed for mandatory injunction to compel each defendant to remove the alleged obstructions so erected (R. 1-6).

The following diagram substantially pictures the situation:


N
THOMAS HRUBY
DUVAL
LAKE CALM
SECTION LINE

Duval answered admitting her ownership of the described lands and averring—

> ". . . that she did have land or dirt pushed into the lake approximately 28 feet from the shore line, but that it was pushed in on her own property south of the dividing line between her property and that of the plaintiffs. . . ."

and that it was for her own purposes. (R. 9).

This averment was admitted to be true at a pre-trial conference (R. 12).

The Chancellor granted the relief prayed by Thomas, and *ordered Duval to remove the ramp and restore the original shore line,* and allow Thomas to use the water.

The District Court of Appeal of Florida, Second District, affirmed the trial court (Appendix B).

The Supreme Court of Florida granted certiorari (R. 40), and upon final hearing also sustained the Chancellor's decree (Appendix A). Petition for rehearing was timely filed and denied. (R. 50-54).

(f) WHEN FEDERAL QUESTIONS WERE FIRST RAISED.

The federal questions involved were first raised in the trial court by petition for rehearing; they were raised in the District Court of Appeal by Assignment of Errors 1 to 7, inclusive, and in argument by Point I of Appellant's Brief in the District Court of Appeal (App. C) (R. 29; 35); and raised in the Supreme Court (1) in the Petition for Writ of Certiorari to the District

Court of Appeal (R. 35, 37); (2) in the brief in support of such Petition (R. 60), and (3) in the Petition for Rehearing in the Supreme Court (R. 52).

Said consitutional questions were ignored by the Supreme Court of Florida and by each of the lower courts. No mention thereof appears in the opinions.

(h) AMPLIFYING THE REASONS RELIED ON.

Due Process of Law.

It seems evident that since the state, by judicial fiat, has required petitioner (1) to remove the ramp (a wharf-like fill) *on her own submerged land,* (2) to restore the natural shore line, and (3) to allow respondents equal use with the petitioner of her said submerged lands, her property has been taken without due process of law.

State of Washington, ex rel Seattle Title & T. Co. vs. Roberge, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210; *Weems Steamboat Co. v. People's Steamboat Co.,* 214 U. S. 345, 29 S. Ct. 661, 53 L. Ed. 1024; *Delaware, L. & W. R. Co. v. Town of Morristown,* 276 U. S. 182, 48 S. Ct. 276, 72 L. Ed. 523; *Muhlker v. New York & H. R. Co.,* 197 U. S. 544, 25 S. Ct. 522, 49 L. Ed. 872.

In the *State of Washington* case, this Court, reversing the Supreme Court of that state, held that a trustee who owned and maintained a philanthropic home for the aged poor had the right to erect buildings and enlarge the institution, notwithstanding a comprehensive zoning ordinance relied upon by the state as prohibitive. Headnote 3, Supreme Court edition says:

"Right of person to devote his land to any legitimate use is 'property', within protection of Const. Amend. 14, providing property shall not be taken without due process of law."

In the *Weems Steamboat Co.* case this Court, reversing the Court of Appeals for the Fourth Circuit, held that—

"The owner or lessee of the exclusive right to use a wharf on a navigable stream need not permit its use by others upon payment of reasonable compensation therefor because there is no other wharf at that port, or because such use is convenient, and has been permitted by the former owner or lessor." (hdnt. 2, Sup. Ct. Rep.)

In the *Delaware L. & W. R. Co.* case this Court, reversing the Court of Appeals, held that—

"Town held not authorized, under guise of regulation, to require part of driveway on railroad station grounds to be used as public hack stand, since town, under Fourteenth Amendment to Constitution, cannot require any part of such driveway to be used in service that railway is not under duty to furnish." (hdnt. 7, Sup. Ct. Rep.)

In the *Muhlker* case, this Court held that the law is established beyond question that the easements of light and air are appurtenant to abutting lots, and—

". . . that they are as much property as the lots themselves." (25 S. Ct. 528)

and held that the operation of an elevated railroad in a street of New York City violated said rights.

Due process requires condemnation and payment of just compensation when property is taken for a public purpose, and unequivocally denies the right to take private property for the private benefit of other persons.

Mrs. Duval's ownership is admitted (1) by the Complaint filed by respondents which gives the legal description by government survey; (2) in the opinion of the District Court of Appeal (App. B), and in the opinion of the Supreme Court (App. A).

The Supreme Court of Florida, in several earlier decisions, held that non-navigable lakes are the subject of private ownership. *Osceola County v. Triple E. Development Co.*, (Fla. 1956), 90 So. 2d 600; *Pounds v. Darling*, (Fla. 1918), 75 Fla. 125, 77 So. 666.

The District Court of Appeal predicated its decision against petitioner primarily on the theory that the so-called Massachusetts and civil law rule, to-wit: that riparian owners abutting a non-navigable lake have the use of the lake in common, is better suited to Florida conditions that the common law rule, namely: that each owner has exclusive use and control of the portion of the non-navigable lake, the bed of which is owned by him.

The Supreme Court based its adverse opinion upon the theory that although the common law is by statute (supra page 4), made the law of Florida, except where legislatively changed, and the court is bound thereby, nevertheless the court was unable to determine with certainty what the common law was prior to July 4, 1776, with reference to the ownership of the beds of

non-navigable lakes. Hence, since Florida is a tourist state, it would be better to have all lakes open for the use of the public in general.

We submit that vested property rights cannot be taken without compensation on the ground of expediency, or at all.

The right of acquiring, possessing and protecting property is natural, inherent and inalienable. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. *Vanhorne's Lessee v. Dorrance*, 2 U. S. 304, 2 Dall. 304, 1 L. Ed. 391.

Moreover, the decision that it could not determine what the common law was in 1776 is unjustified, because this Court, in *Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (cited by petitioner in her brief in said Court and in her Petition for Rehearing, R. 53), considers the question at great length, citing many ancient authorities including Lord Coke, and holds that—

> "By the common law, fresh-water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil *usque ad filum aquae*."

This opinion has been cited and followed many times by the courts of the various states. The Florida court cited and followed it in *Osceola County v. Triple E. Development Co.*, (supra, page 10).

The *Hardin* case discusses and explains the common law rule, the civil law rule, and the Massachusetts rule which is based on a colonial ordinance.

The facts of the case at bar make an even stronger case for the petitioner than the facts in *Hardin v. Jordan,* because in the instant case *the petitioner claims by virtue of a congressional survey. The section line, her boundary, runs through the non-meandered lake,* whereas in the *Hardin* case plaintiff was only a *riparian* owner.

Under the common law boundary lines running *to* a non-navigable body of water were, by operation of law, extended into the lake or stream. In such cases, some courts have taken more liberty in deciding rights with reference to the submerged area. In the case of ownership, *under congressional survey,* of part or all of a non-meandered non-navigable lake bed, the courts take no such liberty. In the latter case the land is sold by the acre and taxed by the acre.

A copious annotation in 57 A.L.R. 2d 569, et seq., treats the different situations at great length. From page 573, we quote:

> "Very generally, the public has rights to the use of the surface of public waters, whereas the owner of the bed underlying private waters has exclusive rights in the surface thereof.
>
> . . . . . .
>
> . . . Apparently the general rule is different for lakes the beds of which are owned by various owners directly by courses and distances than for lakes the beds of which are owned by riparian owners purely by virtue of their riparian rights. Where rights are held in common on the whole surface of the lake, the generally accepted rule is that any one owner may make such use as does not interfere

with the reasonable use of the lake by another owner. Where the lake is owned entirely by persons other than the riparian owners, the latter have no riparian rights in the use of the surface. . . ."

On pages 587-594, Section 7, the Annotation treats in detail, with citations, the holdings in the various states, making the distinctions explained in the above quotation.

The Minnesota Court in *State, by Burnquist v. Bollenbach,* (1954) 63 N.W. 2d 278, holds that the right to hunt and fish is an incident of ownership of the soil, and on page 286 says:

"It is elementary that every person has exclusive dominion over the soil which he absolutely owns; hence such an owner of land has the exclusive right of hunting and fishing on his land, and the waters covering it. Therefore, the precise question in this case is whether the facts in this case show that the plaintiff is the absolute owner of the soil beneath the waters of Howard Lake. If his ownership thereof is not qualified by any right in the state in trust for the public, he has the same absolute supremacy over such waters as if they were solid land."

Reasonable Use Doctrine.

The opinion of the District Court of Appeal gratuitously and erroneously says:

"In the instant case the fill of debris running out into the lake could, under no stretch of the imagination, answer any reasonable use or need of one defendant" (Mrs. Duval), etc. (R. 21)

This statement is obviously erroneous because Mrs. Thomas, one of the plaintiffs, testified—

"it is a fill. It looks like a road out." (R. 26)

And Mrs. Duval says the dirt was dragged down in making a road (R. 27). Moreover, the order of the Chancellor on the pre-trial conference (R. 12), states that both parties agreed—

". . . that the facts set forth in the answer of said defendant (Duval), as amended, are correct as to the filling of the land," etc.

The portion of the answer referred to is paragraph 9 (a) (R. 9), which says in part —

". . . she did have land or dirt pushed into the lake approximately 28 feet from the shore line, but that it was pushed in on her own property south of the dividing line between her property and that of the plaintiffs. This defendant further avers that the purpose of said bull dozing had no relation to plaintiffs whatever, but was to supply a personal need of this defendant, wholly separate and apart from any question of boundary lines or other relation to the plaintiffs."

Obviously, therefore, no question of improper use by Duval of her property with relation to her neighbors is involved. Obviously, also, the ramp is useful for launching and removing boats from the lake, for taking water from the lake in reasonable quantities to water freshly-set citrus and other trees and plants, etc.

In addition, the original Duval fence built in 1926 and subsequently maintained by her, extended out into the lake to the common corner (R. 10); hence, the ramp was not a new occupation of her property.

The reasonable use doctrine as a limitation upon the right of one neighbor to so use his property as not to unlawfully damage another relates to nuisances, not to useful improvements.

(i) EQUAL PROTECTION OF THE LAWS DENIED.

In *Hamilton v. Williams,* 145 Fla. 697, 200 So. 80, the holder of a hunting and fishing license contended that since the title to wild game is vested in the State as trustee for all of the citizens, with full power and authority in the State to regulate and protect the same, he was authorized by said license to enter the enclosed lands of other parties for hunting purposes.

The Court answered by saying that—

> "The power of the legislature to control the subject of hunting game does not authorize the legislature to deprive a citizen of vested property rights except by due process of law." (headnote 5)

And further said:

> "The owner of soil, however, has a special and qualified interest in the wild game while it is thereon. Such special and qualified interest is a property right incident to his ownership of the soil." (200 So. 81, col. 2, text under hdnt. 4)

In the case at bar the unqualified owner of submerged lands is denied similar rights.

(j) IMPORTANCE OF ULTIMATE QUESTION INVOLVED.

This Court takes judicial notice that Florida has about 30,000 lakes, most of which are landlocked, non-meandered and non-navigable. The opinion of the District Court of Appeal (R. 19, App. B. page B-6) says 30,000.

It follows that many thousand owners, similar to petitioner, are affected by the decision in question as also thousands of sportsmen.

Respectfully submitted,

O. K. REAVES,
Counsel for Petitioners.

Of Counsel:

JOSEPH A. McCLAIN, JR. and
MABRY, REAVES, CARLTON,
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Tampa, Florida.

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1959

ELIZABETH J. DUVAL,
Petitioner,
vs.
VERNON T. THOMAS and RUBY LEE THOMAS,
Respondents.

CASE NO. 29,783

MARIAN HRUBY,
Petitioner,
vs.
VERNON T. THOMAS and RUBY LEE THOMAS,
Respondents.

CASE NO. 29,784

Opinion filed July 17, 1959

Writs of Certiorari to the District Court of Appeal, Second District

Mabry, Reaves, Carlton, Fields & Ward and O. K. Reaves, for Elizabeth J. Duval, Petitioner

G. Richard Christ for Marian Hruby, Petitioner
John S. Berry, for Respondents

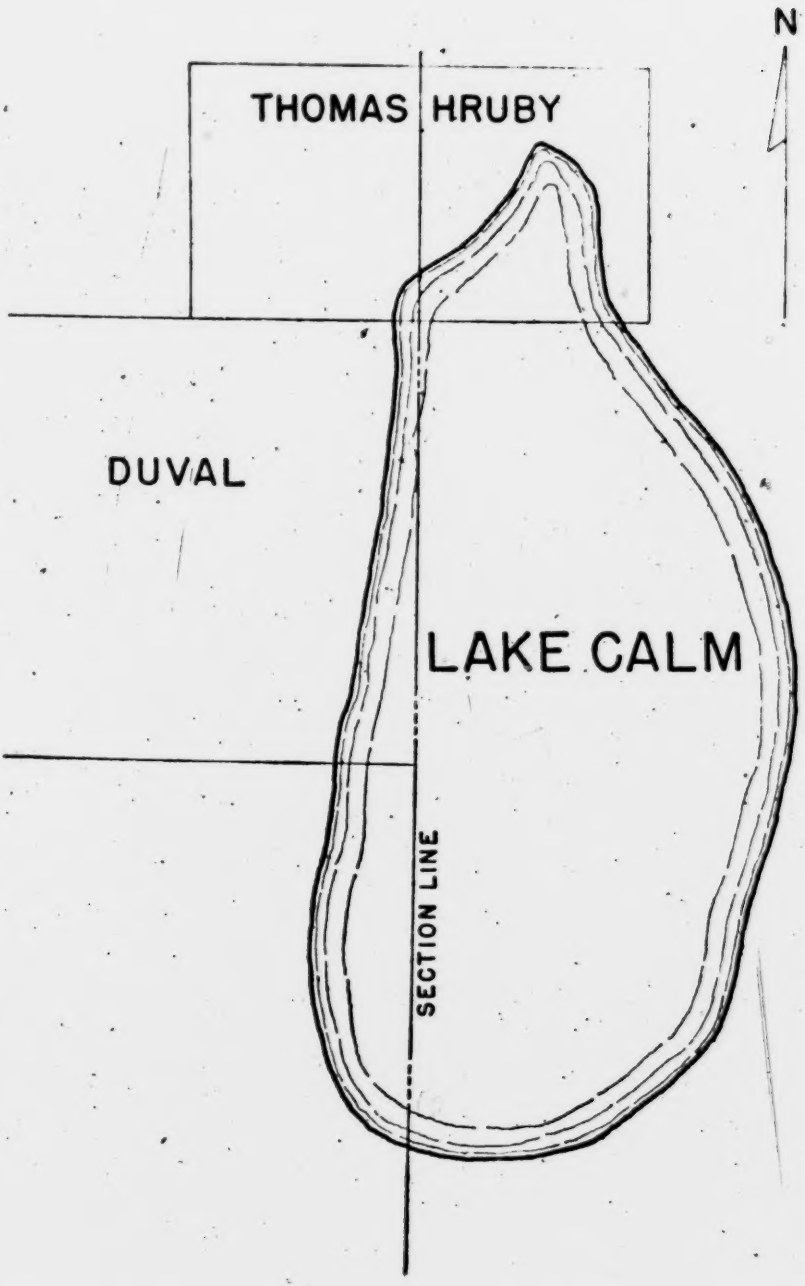
THOMAS, C.J.:

These two cases have reached this court via petitions for certiorari to review a decision of the District

Court of Appeal, Second District, which decided both appeals in one opinion. Duval and Hruby v. Thomas, Fla. App., 107 So. 2d 148. Because of the identicalness of the salient facts and the points of law involved we will treat them in the same manner.

Briefly, the reason this court entertains jurisdiction is the apparent conflict among our decisions and consequently between some of them and the one of the District Court of Appeal in the instant case, with reference to the application of the common law and civil law doctrines to the rights of owners of property such as we will now describe.

In order more clearly to present the facts, we will, at the outset, record a rough sketch of the locale.


N
THOMAS HRUBY
DUVAL
LAKE CALM
SECTION LINE

Further to simplify the statement of fact we will refer to the respondents, who were successful in the circuit court and district court of appeal, as "Thomas" and to the petitioners, owners of adjoining land, as "Duval" and "Hruby". The lake is non-navigable and land-locked and is wholly owned by the parties litigant and, presumably, by others who are not parties to this litigation.

The controversy arose when Duval placed a barrier of soil in the lake along the north boundary of her property to the corner common to the land of herself, Hruby and Thomas, and Hruby constructed a fence on her west line from the shore to the common corner. By these methods Thomas' use of the lake was restricted to the small "wedge-shaped" area defined by his east and south lines and the lake shore between them.

Thomas sought relief from this obstruction against his access to the lake and was awarded a decree.

The chancellor held that the actions of Duval and Hruby served no proper purpose and constituted an unreasonable use of the portion of the lake affected so he ordered them to remove the barriers they had constructed and to restore the natural shore line and, moreover, he enjoined them from a repetition of their actions in this respect.

The ultimate question is whether an owner of property with certain of its boundaries under the water of a lake, such as Lake Calm, has exclusive dominion over it and, by the same token, is confined to his own boundaries or whether all similarly situated owners may use

all of the lake for boating, bathing and fishing so long as none interferes with the rights of the others.

It is argued that under the common law doctrine only the owner could use the water overlying his fee, Smoulter v. Boyd, 1904, 209 Pa. 146, 58 Atl. 144, while under the doctrine of the civil law the whole lake could be used by any other owner of a part of the bottom subject, of course, to the rights of those in like situation. Snively v. Jaber (1956) 48 Wash. 2d 815, 296 P. 2d 1015, 57 A.L.R. 2d 560. In view of the presence in Florida of literally thousands of lakes the question is one of considerable importance.

With this brief preface, we go now to a consideration first of the common law doctrine and a study of the reasons it should be accepted, or rejected. In effect, the District Court of Appeal after a learned discussion of the legal questions presented held that the civil law doctrine did apply and affirmed the chancellor's decision.

On behalf of one of petitioners it is asserted that the decision of the District Court of Appeal collides with the ruling of this court in Osceola County v. Triple E. Development Company, Fla., 90 So. 2d 600, in which they think this court embraced the common law rule because of the language that inland lakes are subject to private ownership and when so owned are not accessible to the public or adjacent owners whose titles extend only to the water's edge. But it seems to us that the controlling facts in that litigation are so unlike those with which we are dealing that the judgment did not amount to a commitment of this court to the common law as distinguished from the civil law principle.

The lake in question was entirely owned by one corporation, so that it was impossible for anyone to reach it except by trespassing. The attempt to open the lake to the use of the public was made by condemnation to secure a right-of-way from a nearby highway to the shore. Obviously, an easement for a "public way over private property" was sought in order to admit the public to the lake. "Such an appropriation * * * [was held not to be one] for a public purpose" and was disapproved. We consider that it would not be logical to place the county in that case in the same postion as Thomas in this one, or the owner of an entire lake in the same position as Duval and Hruby. There was no pretense that property appropriated by eminent domain would have amounted to more than an easement to the water's edge over private property of the lake owner.

The decision that a lake could be actually owned was a recognition by the court of an element both of the civil and common law doctrines, but it did not bind us to the former. And, inasmuch as but one owner was then involved the opinion does not aid us in determining relative rights when a lake is owned by two or more persons.

A study of the decision in Pounds v. Darling, 75 Fla. 125, 77 So. 666, does not reveal any language that could be said to recognize a common law doctrine that each owner of a portion of a lake bed should be restricted to the use of the water within the boundaries of his property. It was merely held in that case that the city of Orlando could not prevent owners of lots abutting a lake from bathing in its water because such would amount to taking property without due process of law.

but the litigation did not involve a decision about the rights of the owners of the bed in relation to one another. We do not construe the decision as a pronouncement that in such a situation each owner could disport only within the confines of his own land lines. The question was, rather, whether or not all owners could be prohibited from bathing in the waters of a lake as a whole because it was used, presumably by consent, as a source of water for the city.

It is further asserted that the decision we are reviewing directly conflicts with a ruling of this court that a person owning land has the exclusive right to hunt game on it subject to lawful regulations by the state. Hamilton v. Williams, 145 Fla. 697, 200 So. 80. Here, too, the element of trespass is involved and to bring the decision into conflict with the one being considered would require adoption of the view that once a person came upon a lake, like Lake Calm, he would trespass if he crossed the underwater lines of the property he had lawfully entered.

It appears that such a trespass was recognized by this court in Clement v. Wilson, 63 Fla. 109, 58 So. 25. The appellant had gone upon a non-navigable cove and had been there assaulted by the appellee whose wife owned all the land around the cove except the mouth which joined it with New River Sound. The court held that the appellant could not recover for an unlawful assault inasmuch as he was a trespasser. But it should be stressed that the body of water was wholly owned by the appellee's wife and there was therefore no way for the appellant to enter it across his own property. At a glance the case seems to give the petitioners some

comfort but there was a total absence of the problem of corresponding rights such as are present in the instant case arising from the use of a lake by those owning its shores and bed, and the decision is not in our opinion determinative of the present point.

It is argued that despite the efficacy in Florida of the English common law in effect 4 July 1776, Sec. 2.01, Florida Statutes 1955, and F.S.A., the District Court of Appeal disregarded it and adopted instead the rule of the civil law. In this regard the following language of this court in Ripley v. Ewell, Fla., 61 So. 2d 420, 423, is significant:

> "When the rules of the common law are in doubt, or when a factual situation is presented which is not within the established precedents, we are sometimes called upon to determine what general principles are to be applied, and in doing this we, of necessity, exercise a broad judicial discretion. It is only proper that in such cases we take into account the changes in our social and economic customs and present day conceptions of right and justice. When the common law is clear we have no power to change it."

It does not seem to us that we are obligated in a case of this kind to embrace the view that by clear provisions of the common law the owners should be restricted to operations within their own land lines. On the contrary, we feel free to announce that the body of water should be available to all owners for use that would not unreasonably interfere with rights of the other proprietors. If the use by any owner amounts to transgression of the rights of his neighbors, the violation can be remedied by recourse in the courts.

We think the situation of Thomas is a classic example of the unpleasant and impractical state of affairs that would result from the application of a rule that each owner could erect a barricade on his boundary line, though it was of the kind, such as a fence, that would not disturb the waters in place, but would prevent adjacent owners from enjoying the ordinary pleasures of the lake.

Having concluded that we are not bound to the common law rule as it is defined by the petitioners, we exercise the discretion recognized in Ripley v. Ewell, supra, and adopt the civil rule. In doing so we do not disturb the decision of the District Court of Appeal and do not lack company in other jurisdictions. Snively v. Jaber, supra, cases annotated in 57 A.L.R. 2d 569, 592.

We are not advised, and our own research has not divulged the clear, unambiguous pronouncement of the common law in effect 4 July 1776, that would leave us no room but to adopt it in this case under the mandate of Sec. 2.01, supra. Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780; Banfield v. Addington, 104 Fla. 661, 140 So. 893. As has been remarked by this court, when grave doubt exists of a true common law doctrine such as would govern dual or multiple ownership of property like Lake Calm, we may, as was written in Ripley v. Ewell, supra, exercise a "broad discretion" taking "into account the changes in our social and economic customs and present day conceptions of right and justice." It is, to repeat, only when the common law is plain that we must observe it.

In making the observation that the common law relating to the question involved is unclear, we have not disregarded decisions of the courts of other states defining and applying it. Illustrative of these are Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578, and Sanders v. DeRose, 207 Ind. 90, 191 N.E. 331. See Linthicum v. Shipley, 140 Md. 96, 116 Atl. 871, 23 A.L.R. 754, and note. But we have not found cases from the English courts, and have been cited none, fixing the relative rights of owners of the bed of a lake of the nature of Lake Calm.

We take judicial knowledge of the importance of 'tourism' to our state. Florida is advertised as a playground, a retreat from the hurryscurry of the modern world and from the rigors of northern climes. Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here. If the enjoyment of non-navigable lakes were to be curtailed or restricted by a holding that the owner of a portion of one of them, and his guests, should enjoy the waters only within the property lines the damage would be immeasurable.

We lean to the more liberal rule and we think we may be kept from falling, into error, by the obscureness of the common law rule, the resultant power to use our own discretion, the practicalities of the matter and the expressions in our own opinions.

Although we considered that there was apparent conflict justifying our taking jurisdiction we conclude after careful study there is none, so we discharge the writs of certiorari.

TERRELL, HOBSON, THORNAL and O'CONNELL, JJ., concur.

APPENDIX B.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

SECOND DICTRICT

JULY TERM, A. D. 1958

ELIZABETH J. DUVAL and
MARIAN HRUBY,

Appellants,

vs.

VERNON T. THOMAS and
RUBY LEE THOMAS,

Appellees.

CASE NO. 442

Opinion filed October 24, 1958.

Appeal from the Circuit Court of Hillsborough County; James S. Moody, Judge.

O. K. Reaves, of Mabry, Reaves, Carlton, Fields and Ward, Tampa, for appellant Duval; G. Richard Christ, Tampa, for appellant Hruby.

John S. Berry, Tampa, for appellees.

SHANNON, J.

Appellants were the two defendants in the court below and they are appealing from the final decree of the chancellor.

The final decree of the chancellor reads in part as follows:

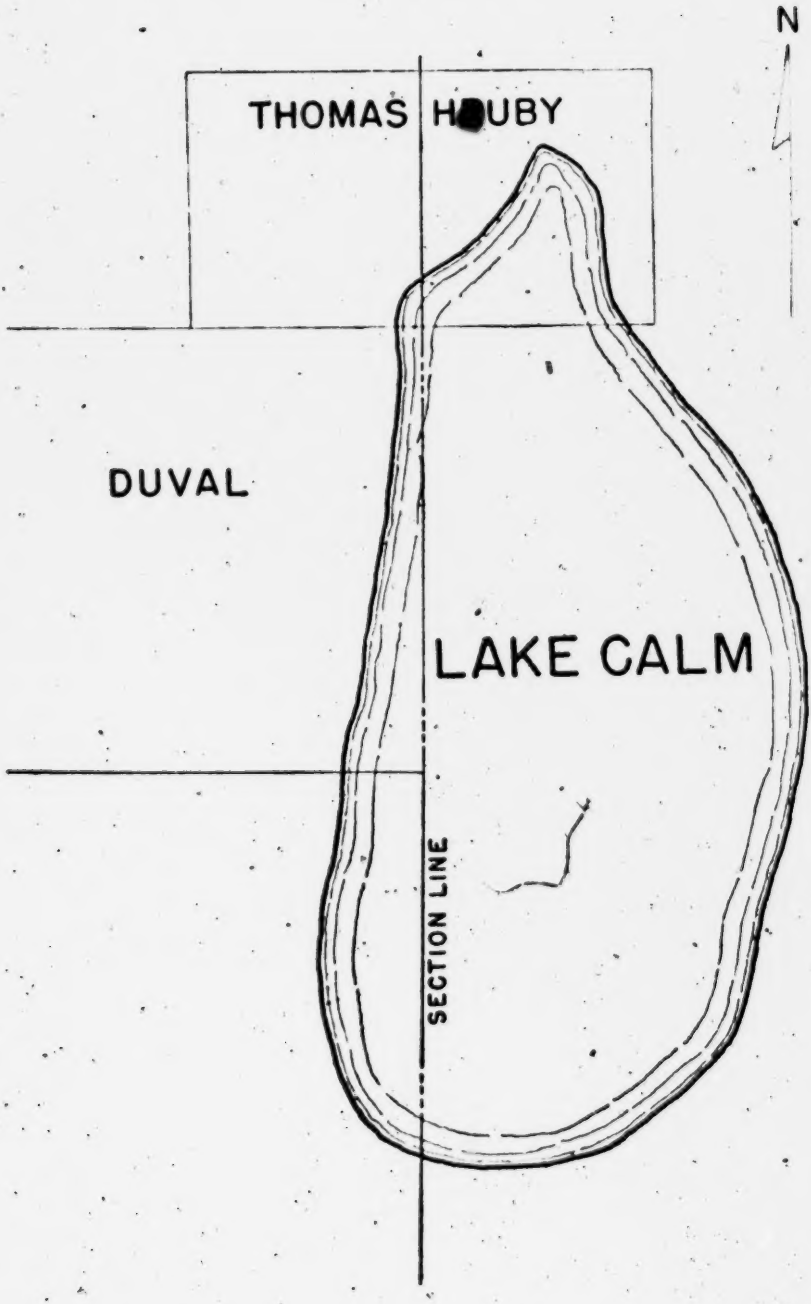
"1. That this Court has jurisdiction of the parties and of the subject matter of this cause; that Plaintiffs, Vernon T. Thomas and wife, Ruby Lee Thomas, have the riparian right of ingress and egress in and to the main body of Lake Calm for reasonable use subject to the limitation that such reasonable use shall not invade the right of other riparian owners; that the erection of the fillbarrier by the Defendant, Elizabeth J. Duval, and the fence by the Defendant, Marian Hruby, to the southeastern corner of Plaintiffs' property serve no useful purpose and are an unreasonable use of that portion of Lake Calm by said Defendants; that the Defendant, Marian Hruby, shall immediately remove all of the fence posts which have been placed along the eastern boundary of Plaintiffs' property extend out into Lake Calm and is hereby enjoined from rebuilding the fence or from placing any barrier of any similar nature along said boundary other than the now existing wire fence which shall extend no further into Lake Calm than now constituted.

"2. That the Defendant, Elizabeth J. Duval, shall immediately remove all of the fill and debris laden land which she has caused to be pushed out into Lake Calm along the southern boundary of the property of the Plaintiffs, Vernon T. Thomas and Ruby Lee Thomas, and re-establish the lake shore line in substantially the same condition as the same existed prior to the pushing of said fill and debris laden land out into the lake; and the Defendant, Elizabeth J. Duval, is hereby enjoined from erecting any barriers or fences of any similar nature along the southern boundary of the property of the Plaintiffs, Vernon T. Thomas and Ruby Lee Thomas, which extends out into Lake Calm."

The chancellor having studied the record, and testimony of all the witnesses, further found by his final decree the following facts:

"* * * that the Plaintiffs, Vernon T. Thomas and Ruby Lee Thomas, are the owners of a portion of the bed of Lake Calm which lies over and upon the southeastern corner of their property; that the Defendant, Elizabeth J. Duval, is the owner of a portion of the bed of Lake Calm adjoining the Plaintiffs' property to the south; that the Defendant, Marian Hruby, is the owner of a portion of the bed of Lake Calm adjoining the Plaintiffs' property to the east; that all of said parties have a mutual corner at the southeastern corner of the Plaintiffs' property; that Lake Calm is not a navigable lake; that the Defendant, Elizabeth J. Duval, has erected a barrier consisting of fill and debris approximately ten feet in width immediately adjacent to the Plaintiffs' south line running from the shore line to the southeastern corner of Plaintiffs' property; that said barrier was constructed to serve and serves no useful purpose; that the Defendant, Marian Hruby, constructed, or attempted to construct, a fence immediately adjacent to Plaintiffs' property on the east from the shore line to Plaintiffs' southeastern corner which said fence was only for the purpose of keeping said Defendant's child and pets on her own property; that the Defendant, Marian Hruby, had constructed no other fence around the other portions of her property; that the fence at the time of the trial of the case consisted of a wire fence and posts extending approximately ten feet into the lake and posts thereafter to the southeastern corner of the Plaintiffs' property."

For the purpose of understanding this situation we attach hereto a handmade map which gives a fairly close pictorial view of the situation that we are called upon to decide. The map was not made by an engineer and it is used primarily for the purpose of a pictorial view.


N
THOMAS HOUBY
DUVAL
LAKE CALM
SECTION LINE

The two defendants in their appeals have separate briefs on the points that they have raised but we believe that one question which is raised by one of the defendants is decisive in this case and that question is, does the owner of a portion of the bed of a nonnavigable land locked lake have the right to exercise *exclusive* dominion and control over that portion of the bed and the waters of the lake which he owns. The chancellor found certain facts, upon conflicting evidence, in his final decree and these facts we will take as true and hence, the question of law which has been raised will be determinative of this case.

At the outset we might say that we are indebted to James W. Cullis, Esquire, for his very valuable notes on Extent of Private Rights of Nonnavigable Lakes appearing in Volume 5, University of Florida Law Review, page 166, which appeared in 1952. On the right to use the author states:

> "The riparian rights recognized by the common law are numerous; and as a general rule they are the same for both lakes and streams. The subsequent discussion is limited to the right of an owner of a portion of the bed of a lake to use the whole lake, although, as we have seen, this question requires a prior determination of the right of Florida riparian owners to acquire the bed at all, whether by operation of the general presumption or by the calls of a deed including portions of the bed of a lake. Assuming the possibility of such acquisition, can each riparian owner use the whole lake for fishing, boating, and bathing, or is he restricted to those waters overlying his fee? The various state courts have adopted one of two divergent views, the common law or the civil. The effort here is to summarize the two views without, however, presenting an exhaustive analytical examination of the rationale and history of each.

"The common law view restricts each owner to the use of the water immediately overlying his fee and regards any intrusion as a trespass; in other words, as to dominion no distinction is made between the land and the water. The civil law allows the owner of a portion of the bed to use the surface of the entire lake for fishing, boating, and bathing as long as he does not unduly interfere with the rights of the other proprietors.
"* * *

"Perhaps the most persuasive argument for the civil law rule is its practicability. Many of Florida's lakes are relatively small and are used exclusively for private recreational purposes. To restrict each owner to his own waters seriously curtails and in some locations even prohibits, certain sports. The effect on the water skier and the sailing enthusiast is obvious. Restrained by a 'reasonable use' limitation, however, each riparian owner can benefit from the whole lake and yet have his remedy against neighbors that indulge in improper use. On the other hand, the common law view offers some commercial advantages; and of course the standard arguments supporting nonabrogation of any common law rule apply here with equal force.

"Turning with misgivings to a search for the rule in Florida, the ironic specter of 30,000 lakes and no case law arises. A study of the decisions and statutes relating in any way to lakes furnishes few if any clues to the position that the Florida Supreme Court will take when faced with the problem. Our adoption of the common law of England will manifestly constitute an argument in favor of accepting the common law theory, although topographically Florida and England have little in common. A century ago, when our English legal heritage commanded greater recognition and when individual rights in property were held in higher esteem than public rights, the civil law theory

would no doubt have received less favorable consideration. Today, however, public rights are assuming increasing prominence, and adoption of this rule would not only bestow by law greater practical benefits upon the common owners of the typical Florida lake but would in fact do little more than confirm the general practice followed for many decades in Florida.

"* * *

"Whether the bed owner will be confined to the waters overlying his fee is a question that may arise any day, although as yet it had not reached our Supreme Court. It is submitted that, when the question does arise, adoption of the civil law view will best serve the interests of Florida, with its great inland lake area and its emphasis on sports and recreation, not only for Floridians but also on a broad commercial basis for tourists."

A case decided before the above article was written, Taylor v. Tampa Coal Co., Fla. 1950, 46 So. 2d 392, takes the "reasonable use" view as may be gathered from the opinion wherein it is stated in part:

"(1-4) It is the rule that the rights of riparian proprietors to the use of waters in a non-navigable lake such as the one involved are equal. Except as to the supplying of natural wants, including the use of water for domestic purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor, each riparian owner has the right to use the water in the lake for all lawful purposes, so long as his use of the water is not detrimental to the rights of other riparian owners. * * * The fact that one riparian owner may choose to use the water in the lake for recreational purposes while another may desire to divert it for an artificial use such as irrigation, will not give the

latter a superior right to take water to the detriment of the former, for in this jurisdiction there is no distinction in respect to use between a farm and a summer residence. The use of lands bordering on, and the waters of, such a lake, for the purpose of pleasure, recreation and health constitutes such a use of the lake as to command a remedy for an unlawful interference with its natural condition.***"

The Supreme Court of Arkansas in 1955 in the case of Harris v. Brooks, Ark. 1955, 283 S.W. 2d 129, cited with approval Taylor v. Tampa Coal Co., supra; and in discussing the reasonable use theory has this to say:

"*Reasonable Use Theory.* This theory appears to be based on the necessity and desirability of deriving greater benefits from the use of our abundant supply of water. It recognizes that there is no sound reason for maintaining our lakes and streams at a normal level when the water can be beneficially used without causing unreasonable damage to other riparian owners. The progress of civilization, particularly, in regard to manufacturing, irrigation, and recreation, has forced the realization that a strict adherence to the uninterrupted flow doctrine place an unwarranted limitation on the use of water, and consequently the court developed what we now call the reasonable use theory. * * * It has been stated that each riparian owner has an equal right to make a reasonable use of waters subject to the equal rights of other owners to make the reasonable use, United States v. Willow River Power Co., 324 U. S. 499, 65 S. Ct. 761, 89 L. Ed. 1101. The purpose of the law is to secure to each riparian owner equality in the use of water as near as may be by requiring each to exercise his right reasonably and with due regard to the rights of others similarly situated. Meng v. Coffey, 67 Nev. 500, 93 N.W. 713, 60 L.R.A. 910."

We had this question before us in the case of Lake Gibson Land Company v. Lester, 102 So. 2d 833, which opinion was handed down during May of 1958 by this court, where we discussed Taylor v. Tampa Coal Co., supra, as well as Harris v. Brooks, supra, and in which we followed the Taylor case and cited with approval the Harris case. In the cases cited by the defendants the decisions are primarily controlled by other factors. In the case of Taylor Fishing Club v. Hammett, Texas 1935, 88 S.W. 2d 127, the decision is favorable to the defendants, and among all of the cases cited there are some statements which would appear to be favorable to the defendants' side of the case. However, in our study of the law a large number of cases have statements in them which could be used as persuasive authority towards the plaintiffs' side of the case. In Florida we recognize and apply the rule that when one's lawful use for such purpose as fishing, recreation and irrigation is unreasonably interfered with, the owner of riparian rights, such as the plaintiff here, will have the remedy of injunction. In the instant case the fill of debris running out into the lake could, under no stretch of the imagination, answer any reasonable use or need of one defendant any more than could the fence of the other defendant in protecting her children and pets. It is not denied that the maintenance of these obstructions would not only interfere with, but would effectively prohibit plaintiffs from making any use of the lake other than the very small, shallow portion overlying their land.

There is one case that both defendants have cited in the briefs and that is the case of Osceola County v. Triple E. Development Company, Fla. 1956, 90 So. 2d 600. We have read this case but in its final analysis that case is only authority for the proposition that where a lake is entirely owned by one party the court would enjoin an attempted eminent domain which was for the purpose of building a roadway for the public to use the privately owned lake. This case is no authority for the principle in the instant case.

Affirmed.

ALLEN, ACTING CHIEF JUDGE, and MORROW, R. O., ASSOCIATE JUDGE, CONCUR.

APPENDIX C.

Excerpt from Brief of Appellant Duval (Point 1 of Points Involved), in the District Court of Appeal of Florida, Second District (R. 29), and repeated in Duval's Petition for Writ of Certiorari in the Supreme Court of Florida (R. 35), is as follows:

> Mrs. Duval had the right to make and maintain the fill; therefore to compel her to remove it and subject her property to the use of plaintiffs, would take her property without due process of law, violating 14t' Amendment to U. S. Constitution and Section 12 of Florida Declaration of Rights, and would deprive her of right of enjoying, acquiring, defending and protecting property, contrary to Section 1 of Declaration of Rights.